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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA
SAN DIEGO DIVISION**

11 1800 SOUTH MAPLE STREET, LLC, a) CASE NO. 07-CV-2030
12 California Limited Liability Company;)
13 RALPH J. GIANNELLA, an individual;)
14 GIANNELLA PROPERTIES, INC., a) **PLAINTIFFS' REPLY TO**
15 California Corporation; WILLIAM G.) **DEFENDANTS' OPPOSITION TO**
16 AYYAD, an individual; WILLIAM G.) **PLAINTIFFS' MOTION FOR ORDER**
17 AYYAD, INC., a California Corporation; and) **PERMITTING LEAVE TO FILE**
18 PREMIER COMMUNITIES, LLC, a) **AMENDED COMPLAINT**
19 California Limited Liability Company.)
20 Plaintiffs,) Date: February 29, 2008
21 v.) Time: 1:30 P.M.
22 ALLIED PROPERTY AND CASUALTY) Courtroom: Honorable Judge Jeffrey T. Miller
23 INSURANCE COMPANY, an Iowa)
24 Corporation; AMCO INSURANCE) Filed: September 10, 2007
25 COMPANY, an Iowa Corporation;) Trial: TBD
26 NATIONWIDE MUTUAL INSURANCE)
27 COMPANY, an Ohio Corporation, and DOES)
28 1 through 100, inclusive,)
29 Defendants.)

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2 INTRODUCTION

3 Plaintiffs hereby file their Reply to AMCO'S opposition to Plaintiffs' motion for an
 4 order permitting the filing of an amended complaint. In its opposition, AMCO has done a
 5 superb job in over-simplifying the facts of this case, completely glossing over its past and
 6 present failures to fulfill its contractual and fiduciary duties to Plaintiff insureds. Indeed, the
 7 frustration, uncertainty, and damage to Plaintiffs caused by AMCO's conduct over the past
 8 several years has been appalling. It is through this lens the Court should consider Plaintiffs'
 9 good faith motive in amending their complaint, for Plaintiffs continue to uncover new deceptive
 10 conduct on the part of AMCO which consistently alters the litigation between the parties, dating
 11 back to the ACC Lawsuit. What has transpired since the removal of this suit to federal court is
 12 no exception.

13 MICHAEL EHRENFIELD COMPANY, whom Plaintiffs are attempting to add in the
 14 current lawsuit, was not included in the original complaint filed in September 2007 due in part
 15 to AMCO's admission of coverage in the ACC Lawsuit. Given this admission, the similarity of
 16 the two cases, and an eagerness to avoid expanding the present litigation, Plaintiffs chose not to
 17 name MICHAEL EHRENFIELD COMPANY as a defendant in their original complaint.
 18 However, after defendants removed this case to federal court in late October 2007, Plaintiffs
 19 learned more information about AMCO's pattern of practice of denying coverage to circumvent
 20 its contractual obligations. During the November 2007 deposition of former insurance-defense
 21 attorney David Veljovich in the ACC Lawsuit, who was co-counsel for the claimants in the
 22 underlying suit, the witness revealed that AMCO's modus operandi in handling claims was to
 23 delay issuing coverage determinations to avoid its obligations to its insureds.¹ These delays
 24 continued long after AMCO's co-defendants issued their positions on coverage.²

25 Having learned this information, in addition to having received another confirmation
 26 from AMCO effectively denying coverage in January 2008, Plaintiffs undertook to amend their
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28 ¹ See Ex. D to Plaintiffs' original motion.

² Id.

1 complaint to add MICHAEL EHRENFELD COMPANY as a defendant to account for any gaps
 2 in insurance coverage. This is the exact course of action taken by Plaintiffs in the ACC Lawsuit
 3 upon their learning that an admission of coverage would not be forthcoming. Importantly, there
 4 was no diversity issue in that case, as one of the named defendants was a California resident,
 5 thereby precluding removal of the case to federal court.

6 Based on these events, it is clear that Plaintiffs' primary motivation in amending the
 7 complaint is their belief that AMCO will continue to deny coverage according to its pattern of
 8 practice, which was recently discovered by Plaintiffs. Plaintiffs' hope that AMCO would finally
 9 admit coverage, as it did in the ACC Lawsuit, was not abandoned until after removal occurred.

10 **II.**

11 **Joinder is Required to Obtain Complete Relief and Protect Plaintiffs' Interests**

12 There are two scenarios of liability in this case, bad faith on the part of AMCO and its
 13 agents or professional negligence on the part of AMCO agent MICHAEL EHRENFELD
 14 COMPANY in securing coverage. Importantly, these two theories of liability are
 15 interconnected, as they hinge on common issues of fact (e.g. communications regarding the
 16 underwriting and adjusting of the claim) and possibly involve a conspiracy to deny coverage
 17 between AMCO and its appointed agent MICHAEL EHRENFELD COMPANY.

18 With respect to bad faith, AMCO underwriter David Everett testified at deposition in the
 19 ACC Lawsuit that he believed he was hoodwinked by AMCO agent Robyn Kettering (then an
 20 employee of MICHAEL EHRENFELD COMPANY) in insuring Plaintiffs for completed
 21 operations coverage under AMCO Policy No. ACP BPH CPAA GLAO 7801001164 (the "1164
 22 Policy") and AMCO Policy No. ACP BPH 7801073037 (the "3037 Policy"), which were at
 23 issue in the ACC Lawsuit.³ (Ex. A at 301:24-304:7.) AMCO said it had no appetite for insuring
 24 developers/renovators.

25 The policy at issue in this case, AMCO Policy No. ACP BPH 7801069841 (hereinafter
 26 "9841 Policy"), was issued on April 4, 2002, the same day that AMCO issued the 3037 Policy

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 28 ³Everett testified at deposition, "it was my understanding from...Ms. Kettering's original presentation...that while
 the insured used to be involved in developing – flipping properties, he had discontinued those operations and was
 now buying and holding."

1 for the ACC project. However, in its denial letter, dated March 3, 2006, AMCO asserted that
 2 Plaintiffs were not entitled to completed operations coverage under the 9841 policy.⁴ This
 3 purported lack of completed operations coverage is peculiar given the 3037 and 9841 policies
 4 were issued to Plaintiffs at the same time, but only the 3037 Policy included the appropriate
 5 coverage for Plaintiffs.

6 There can only be two explanations. The first is that AMCO, finally realizing the rookie
 7 underwriter's mistake in including completed operations coverage in the 3037 Policy, later
 8 conspired with MICHAEL EHRENFELD COMPANY, an AMCO agent, in deliberately
 9 denying completed operations coverage to the relevant entity in the 9841 Policy insuring the
 10 1800 South Maple project. The alternative scenario is that AMCO agent MICHAEL
 11 EHRENFELD COMPANY was negligent in failing to procure adequate coverage for Plaintiffs.

12 Thus, in order to ensure complete relief in the event of gaps in coverage and to avoid
 13 inconsistent rulings in federal and state court, joinder should be permitted to allow for just
 14 adjudication of all the claims. This would also provide efficient resolution of the claims given
 15 the overlapping factual issues regarding the various causes of actions, particularly the
 16 communications between AMCO underwriting and MICHAEL EHRENFELD COMPANY.

17 **III.**

18 **Farrugia v. All-State is Easily Distinguishable from the Present Case**

19 In its opposition, AMCO relies heavily on Farrugia v. Allstate Insurance Company,
 20 2007 WL 781782 (N.D. Cal. 2007.) While some of the facts of the case are similar, there are
 21 important differences. First, the plaintiff in Farrugia did not seek to add the insurer's agent as a
 22 defendant to allege professional negligence and negligent misrepresentation, nor was the agent
 23 even included in the prayer for relief in the proposed amended complaint. Id. at 2. As such, it
 24 was obvious in Farrugia that the insurer's agent was not necessary for just adjudication of the
 25 claim and that his inclusion was merely to defeat the court's diversity jurisdiction.

26 Second, and perhaps more importantly, the court's decision makes clear that the
 27 Farrugia plaintiff made no attempt whatsoever to show why the 1447(e) factors weighed in his
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⁴ See Ex. I to Plaintiffs' original motion.

1 favor. Id. Specifically, the Farrugia court pointed out that the plaintiff did not respond to the
 2 contention that he sought to add the new defendant only to destroy diversity jurisdiction, made
 3 no attempt to show why joinder was necessary for full recovery, and made no attempt to
 4 explain why he waited as long as he did before adding the agent as a defendant. Id. Based on
 5 the Farrugia plaintiff's utter failure to address these issues, even the moving Plaintiffs would
 6 concur with the conclusion of the Farrugia court.

7 However, this is not the case here, as Plaintiffs have explained in great detail why most
 8 of the 1447(e) factors weigh heavily in their favor. Unlike in Farrugia, Plaintiffs have
 9 justifiably added a new defendant, new causes action, and included said defendant in their
 10 prayer for relief to account for any possible gaps in insurance coverage under the 9841 Policy.
 11 Moreover, this motion was brought due to events that have transpired since removal of the case.

12 **IV.**

13 **Nearly All Factors Required Under a 1447(e) Analysis Weigh Heavily In Plaintiffs' Favor**

14 Plaintiffs performed a detailed analysis of the factors under 28 U.S.C § 1447(e) as laid
 15 out in Clinco v. Roberts, 41 F. Supp. 2d 1080 (C.D. Cal. 1999), in their original motion. See
 16 also Palestini v. General Dynamics Corp., 193 F.R.D. 654, 658 (S.D. Cal. 2000). Plaintiffs have
 17 shown that most of the factors weigh heavily in their favor, thus entitling them to amend their
 18 complaint. Having already discussed these factors in their original motion, Plaintiffs will
 19 address below only the contentions made by AMCO in its opposition.

20 **A. New Information Since Removal Prompted the Motion to Amend**

21 Contrary to what AMCO alleges in its opposition, Plaintiffs did not have all the
 22 information they needed to determine whether it was appropriate to add MICHAEL
 23 EHRENFELD COMPANY as a defendant in the original complaint. There were numerous
 24 issues weighing against such a move, not the least of which was AMCO's admission of
 25 coverage in the ACC Lawsuit by none other than AMCO claims director Carl Panico in late
 26 November 2007.⁵ (Ex. B at 208:24-209:2.) Given the similarities between the 9841 Policy and

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 28 ⁵ At deposition, when asked if he "believe[s] that the company has acknowledged coverage under the BPH portion
 under the 1164 policy through its payment of indemnity," Panico responded, "Yes."

1 1164 Policy (at issue in the ACC Lawsuit), as well as similar claims and parties in both cases, it
 2 made sense that a similar admission by AMCO in the present lawsuit would be forthcoming.

3 Moreover, there is an implied covenant of good faith and fair dealing in every contract
 4 that neither party will do anything which will injure the right of the other to receive the benefits
 5 of the agreement. Brown v. Superior Court, 34 Cal. 2d 559, 564. The covenant obligates the
 6 insurer, among other things, to undertake the insured's defense in good faith if there exists a
 7 potential for coverage under the policy of the claim asserted in an action filed against the
 8 insured. Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc., 78 Cal. App. 4th
 9 847, 881 (2000). Importantly, the insurer may unilaterally condition its proffer of a defense
 10 upon its reservation of a right later to seek reimbursement of costs advanced to defend claims
 11 that are not, and never were, potentially covered by the relevant policy. Scottsdale Ins. Co. v.
 12 MV Transp., 36 Cal. 4th 643, 656 (citing Buss v. Sup. Court 16 Cal.4th 35, 61, fn. 27 (1997))

13 Hence, at the time, it was reasonable for Plaintiffs to believe, especially in light of the
 14 ACC admission, that AMCO would reimburse Plaintiffs for defense costs in the underlying suit
 15 while maintaining a reservation of rights in the event there was no duty to indemnify. Thus,
 16 Plaintiffs made a reasonable decision not to add MICHAEL EHRENFELD COMPANY as a
 17 defendant, and they should not now be penalized for trying to avoid being overly-litigious and
 18 doing what was then in the best interests of their clients.

19 Moreover, the November 2007 deposition testimony by David Veljovich in the ACC
 20 Lawsuit, a former insurance defense attorney who has represented AMCO co-defendants in
 21 prior cases, revealed that AMCO's pattern of practice in claims handling is to continually delay
 22 making coverage determinations to avoid its contractual and fiduciary obligations as an insurer.
 23 This testimony raised a red flag for Plaintiffs, prompting them to consider adding MICHAEL
 24 EHRENFELD COMPANY as a defendant in the event there is inadequate coverage.

25 Plaintiffs also explained at the Early Neutral Evaluation that it would give defendants
 26 another opportunity to admit coverage so that a motion to amend naming MICHAEL
 27 EHRENFELD COMPANY as a defendant could be avoided. Plaintiffs proceeded to do just that
 28 in their letter dated Jan. 15, 2008, but in its response that same day, AMCO continued its

1 pattern of practice of effectively denying coverage by postponing a coverage determination
 2 until Plaintiffs gave them information already in AMCO's possession, a sly attempt to place the
 3 burden on Plaintiffs to prove coverage.⁶ At that point, Plaintiffs felt it was absolutely necessary
 4 to add MICHAEL EHRENFELD COMPANY to the complaint to protect their interests.

5 Finally, AMCO has opened up a can of worms for itself in its charge that Plaintiffs have
 6 failed to explain its motive for amending their complaint in the ACC Lawsuit. Indeed, it was
 7 **AMCO's attempted fraud** upon Plaintiffs which precipitated the amended complaint (adding
 8 MICHAEL EHRENFELD COMPANY as a defendant) in the ACC Lawsuit. Accordingly,
 9 Plaintiffs amended their complaint adding, *inter alia*, MICHAEL EHRENFELD COMPANY as
 10 a defendant in the ACC Lawsuit when AMCO unsuccessfully tried to misrepresent the policy
 11 limits of the 1164 Policy as being 1 million per occurrence/ 2 million aggregate (as opposed to
 12 the correct 2 million/4 million limits). The amendment was necessary to account for gaps in
 13 coverage. When AMCO finally conceded that the 1164 policy had the higher policy limits,
 14 Plaintiffs dropped the broker defendants from the suit. Importantly, there was no issue of
 15 diversity jurisdiction in that case, as it was never removed to federal court.

16 As in the ACC Lawsuit, the new circumstances explained here have prompted Plaintiffs
 17 to amend their complaint in similar fashion. The proposed amendment includes a new
 18 defendant, two new causes of action, and a prayer for relief against said defendant.

19 **B. There was no Unnecessary Delay in Bringing the Motion to Amend**

20 There was no delay on the part of Plaintiffs in bringing this motion, for Plaintiffs
 21 promptly moved to amend when new facts giving rise to the motion came to light. It was not
 22 until November 2007, a month after the case was removed, that Plaintiffs deposed Veljovich,
 23 who testified as to AMCO's sordid pattern of practice in delaying coverage determinations.

24 Moreover, Plaintiffs would have brought this motion to amend sooner had the Early
 25 Neutral Evaluation taken place when it was originally set for early December 2007. However,
 26 at the request of AMCO counsel, the ENE was postponed a month and Plaintiffs had to wait
 27 until such time to raise the issue of AMCO admitting coverage before the Court (so as to avoid
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⁶ See Exhibits B & C to Plaintiffs' original motion.

1 a motion to amend). Days after the ENE was held, Plaintiffs sought an admission of coverage
 2 from AMCO one last time. They received no such confirmation. As such, the motion is timely.

3 **C. Failure to Join Michael Ehrenfeld Company Raises the Possibility of**
 4 **Incomplete Relief, Inconsistent Judgments, and Redundant Litigation**

5 “Federal Rule of Civil Procedure 19 requires joinder of persons whose absence would
 6 preclude the grant of complete relief, or whose absence would impede their ability to protect
 7 their interests or would subject any of the parties to the danger of inconsistent obligations.”

8 Boon v. All-State Insurance, 229 F. Supp. 2d at 1022 (emphasis added); Fed. R. Civ. P. 19(a).⁷
 9 However, “although courts consider whether a party would meet [the Rule 19] standard for a
 10 necessary party, **amendment under § 1447(e) is a less restrictive standard than for joinder**
 11 **under [Rule 19].**” Id. (emphasis added). The standard is met when failure to join will lead to
 12 separate and redundant actions.” Id.

13 To obtain complete relief, Plaintiffs must be able to add AMCO agent MICHAEL
 14 EHRENFELD COMPANY as a defendant and a cause of action for professional negligence.
 15 Should the Court conclude that no coverage exists under the 9841 Policy, Plaintiffs will be left
 16 with a gap in coverage and will be forced to relitigate many of the same issues in state court,
 17 which will involve similar witnesses (including AMCO personnel and AMCO agents) and
 18 recollections of events giving rise to the underwriting of the 9841 Policy. Moreover, relitigating
 19 the underwriting of the 9841 Policy in a separate action against MICHAEL EHRENFELD
 20 COMPANY could lead to inconsistent rulings. Should a state court determine that MICHAEL
 21 EHRENFELD COMPANY was not liable for professional negligence and negligent
 22 representation (after a federal court deems there is no coverage), Plaintiffs would be left with no
 23 remedy. By necessity, this is a case of bad faith/conspiracy on the part of the AMCO or
 24 professional negligence on the part of AMCO’S agent.

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 27 ⁷ “Necessary” refers to a party who should be joined if feasible, while “indispensable” refers to a party’s whose
 28 participation is so important to the case’s resolution, that if not joined, the suit must be dismissed. See Schwarzer,
 Tashima & Wagstaffe, Fed Civ. Proc. Before Trial (The Rutter Group 2007) 7:55. However, FRCP 19 has
 eliminated the historical distinction between the two terms, simply calling for joinder “of parties needed for just
 adjudication.” Id. at 7:58.1.

1 Finally, AMCO relies on Palestini v. General Dynamics Corporation, 193 F.R.D. 654
 2 (S.D. Cal. 2000) in support of its argument that redundant actions will not result if joinder is
 3 denied in the present case. (AMCO Opp. p. 11-12.) Deeming the new defendants “necessary
 4 parties,” the Palestini court permitted an amendment adding non-diverse parties and remanded
 5 the case to state court. Palestini, 193 F.R.D. at 658-659. The court noted that separate and
 6 redundant actions would result because the theories against the originally named defendants
 7 and the proposed defendants shared the similar issue of causation. Id. AMCO, in turn, argues
 8 that causation is not a shared issue with respect to Plaintiffs theories of recovery against both
 9 AMCO and MICHAEL EHRENFIELD COMPANY, and therefore, joinder should be denied.

10 However, AMCO’s reading of Palestini is extremely narrow, for the court makes no
 11 mention that the common issue giving rise to separate and redundant actions must be causation.
 12 In this case, there are numerous factual issues that pertain to the various causes of actions
 13 against the insurer and broker defendants, including the communications between AMCO agent
 14 MICHAEL EHRENFIELD COMPANY and AMCO regarding the underwriting of the claim,
 15 the nature of the relationship between these two entities in light of the former’s dual loyalty to
 16 insurer and insured, and any communications or events evidencing a conspiracy by the two to
 17 deny coverage to Plaintiffs. Furthermore, there is no doubt MICHAEL EHRENFIELD
 18 COMPANY has an interest in this controversy. Finally, joinder of MICHAEL EHRENFIELD
 19 COMPANY would serve the interests cited by the Palestini court, namely, “to decide and
 20 finally determine the entire controversy” and doing complete justice “by adjusting all the rights
 21 of those involved.” Id. For all of these reasons, MICHAEL EHRENFIELD COMPANY is at the
 22 very least, a necessary party required for the just adjudication of Plaintiffs’ claims.

23 **D. Authorities Cited by Plaintiffs Support Their Contention that Joinder is**
 24 **Necessary for Just Adjudication**

25 The cases cited by Plaintiffs in their original motion support their contention that joinder
 26 is necessary for just adjudication of their claims. Regarding Boon v. Allstate Ins. Co., 229 F.
 27 Supp. 2d 1016, Plaintiffs concede their error in stating that the insurer’s agent was being joined
 28 as a new defendant. The Boon plaintiffs were adding a cause of action for professional

1 negligence against the defendant agent in their proposed amended complaint. *Id.* at 1019.
 2 However, the court's explicit language still cannot be ignored, for when the court discussed the
 3 plaintiffs' claims against the insurer and the insurer's agent, it stated, "**[t]he claims for breach**
 4 **of contract, bad faith, professional negligence, and failure to pay judgments all relate to**
 5 **the relationship of the insured and the insurer.**" *Id.* Furthermore, in denying the joinder of
 6 the non-agent defendant (i.e. plaintiffs' husband), the court added, "requiring [plaintiff] to
 7 pursue a claim against her husband in state court would not prevent the **just adjudication of the**
 8 **plaintiffs' claims against [the insurer] and its agent in federal court.**" *Id.* (emphasis added).

9 In addition, Plaintiffs' reliance on Desert Empire Bank v. Ins. Co. of North America,
 10 623 F. 2d 1371 (9th Cir. 1980), is completely justified as the case is still considered good law.
 11 The case cited by AMCO to discredit Desert Empire, Gun v. Wild, 2002 U.S. Dist. LEXUS
 12 3628 (N.D. Cal. 2002), is an **unreported case** (federal rules only permit the citation of
 13 unreported cases decided after 1/1/07).⁸ While Desert Empire was decided before section
 14 1447(e) was enacted, one of the principles espoused in Desert Empire, namely, that a district
 15 court that allowed joinder of a non-diverse party to a removed case should remand the case to
 16 state court, was actually codified by section 1447(e). Yniques v. Cabral, 985 F. 2d 1031, 1034
 17 (9th Cir. 1993), disapproved on other grounds, 197 F.3d 1253 (9th Cir. 1999).

18 Moreover, the factors used in Desert Empire to analyze the diversity destroying
 19 amendment under permissive joinder provisions are essentially the same as in Clinco and
 20 Palestini. These similar factors include: resulting prejudice to the parties, the delay of the
 21 moving party seeking to amend the complaint, the motive for seeking the amendment, the
 22 closeness of the relationship between the new and old parties, and the effect of the amendment
 23 on the court's jurisdiction. Desert Empire, 623 F. 2d at 1375. Most importantly, in Desert
 24 Empire, the Ninth Circuit held that a District Court correctly permitted the plaintiff insured to
 25 amend its pleadings post-removal to add a non-diverse insurance agent as a party where the
 26 insured's claims against the defendant insurance company and insurance agent arose out of the
 27 same series of occurrences and raised common questions of law and fact. *Id.* at 1374. Such is

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⁸ See Schwarzer, Tashima & Wagstaffe, Fed Civ. Proc. Before Trial 12:64 (citing FED. R. APP. P 32.1).

1 the case here, as proving bad faith, professional negligence, and conspiracy on the part of
 2 AMCO and its agents will require in-depth inquiry into the underwriting process and the
 3 communications and relationship between AMCO and MICHAEL EHRENFELD COMPANY
 4 with respect to Plaintiffs' insurance policies and claims. Indeed, the common questions of law
 5 and fact are numerous, such that joinder of MICHAEL EHRENFELD COMPANY is necessary
 6 to prevent repetitive litigation and inconsistent outcomes to the prejudice of Plaintiffs.

7 Finally, Plaintiffs stand by their reference to Ingersoll v. Pearl Insurance Company. 153
 8 F. Supp. 558, 560 (N.D. Cal. 1957). This case remains good law and was cited by Plaintiffs
 9 because it explains that when claims against an agent are so interwoven with claims against an
 10 insurer, a complete adjudication of rights of parties cannot be had without the presence of the
 11 former. Id. at 560. While the facts are not identical, this notion is entirely relevant to an analysis
 12 under 1447(e), as Plaintiffs have argued that denial of joinder could preclude the granting of
 13 complete relief, impede their ability to protect their interests, result in repetitive litigation, and
 14 lead to inconsistent rulings to the prejudice of Plaintiffs.

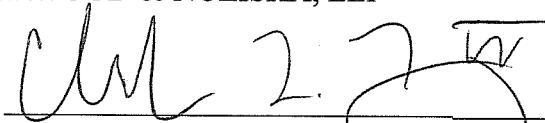
15 **V.**

16 **CONCLUSION**

17 Based on the foregoing, joinder of MICHAEL EHRENFELD COMPANY, with causes
 18 of action for professional negligence and negligent misrepresentation, is appropriate in this case,
 19 as nearly all the factors under a 1447(e) analysis weigh heavily in Plaintiffs' favor. As such,
 20 Plaintiffs respectfully request that the Court grant their motion for leave to amend their
 21 complaint.

22
 23 Dated: February 22, 2008

ROCKWOOD & NOZISKA, LLP

24 By: 

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